liability is to exist in this class of cases, — a result which would seem to be desirable, — such liability must be regarded as an exception to the rule and justified on grounds of policy. It seems impossible, however, to doubt that the enforcement of ordinances falls on the side of governmental functions, and for negligence in this respect there should be no liability at common law.

DEFENCES OF ESTOPPEL AND CONTRIBUTORY NEGLIGENCE AGAINST SOVEREIGNS. —A legal question upon which a dearth of direct authority exists is suggested by two recent cases. One was an action to enjoin the collection of taxes assessed upon the plaintiff's land. In answer to the defence that no taxes had been paid the plaintiff relied upon an alleged estoppel, but the court held that an estoppel *in pais* could not be raised against the city acting in its governmental capacity. *Philadelphia Mortgage, etc., Co.* v. *Omaha*, 88 N. W. Rep. 523 (Neb.). In the other case a suit was brought by a township trustee for negligently setting fire to a roadway. The court in a *dictum* said that as the township was only a political subdivision of the state it was not subject to the defence of contributory negligence. *Pittsburg, etc., R. R.* v. *Iddings*, 62 N. E. Rep. 112 (Ind., App. Ct.).

The doctrine that the defences of contributory negligence and estoppel cannot be set up against a sovereign seems impossible to support upon any legal principle. It is of course universally conceded that no court of its own right may presume to judge between sovereign and subject. It seems clear, however, that the voluntary appearance of a sovereign before a tribunal of justice is a signification of its desire that the issue in question be decided according to the rules of justice administered by that tribunal. The defences of contributory negligence and estoppel are as deeply rooted in the courts' conception of justice as the defences of payment to an action on a bond or waiver to an action on a contract. To say that these defences cannot be set up in an action by or against a sovereign where jurisdiction has once been obtained, is to maintain either that standards of justice vary with the identity of the litigants, or that the state in consenting to the adjudication of the court impliedly stipulates that certain established principles of that tribunal shall not be applied to its disadvantage. Neither position is tenable.

In the negligence case the rule that the state is not liable for the negligent acts of its agents was relied upon to support the conclusion that their contributory negligence could not be set up in an action by the state. Such a conclusion, however, is founded upon a misconception of the basis of the non-liability of the state for the negligence of its agents. That immunity does not rest upon the ground that the acts of the agents are not the acts of the state, but is based upon the principle that the state is not amenable to the courts for its acts. There are certain legal analogies that seem to be in point and tend to a conclusion different from that reached by the courts in the cases under discussion. The ordinary rules of practice are not dispensed with by the fact that one of the parties to the action is a sovereign. *King of Spain* v. *Hullet*, 1 Cl. & Fin. 333. And in a suit for ejectment by a sovereign the defence of a waiver of conditions may be set up if the acts of the sovereign's agents would ordinarily constitute a waiver. *Davenport* v. *The Queen*, 3 App. Cas. 115. In this

country it has been held that a suit instituted by a state in its own courts but involving a federal question may be removed by the defendant to a federal court, and the general rule was laid down that the state comes into court as any other plaintiff so far as its opponent's right to defend is concerned. *Abeel* v. *Culberson*, 56 Fed. Rep. 329. Finally, although there is some authority to the contrary, the prevailing view is that an estoppel by deed may be set up against the state. BIG., EST., 5th ed., 340.

Upon principle and analogy, therefore, the correct view would seem to be that the law should be applied in the same way in a suit to which a sovereign is a party as in an action between individuals, provided no express prerogative of the sovereign is thereby infringed. See 15 HARV. L. REV. 59.

DEMURRER TO EVIDENCE IN CRIMINAL CASES. — The demurrer to evidence, deep-rooted as it was in the common law, has generally been superseded by the motion to enter a nonsuit, to direct the verdict, or to exclude the evidence from the jury. For these motions before the court are a less technical procedure than the demurrer to evidence and accomplish the same result of transferring from the jury to the judge the application of the law to the facts. Nevertheless the practice of demurring, although unusual, is still recognized in nearly half the states as a proper form of procedure in civil suits. See *Hopkins* v. *Nashville, etc., Ry. Co.*, 96 Tenn. 409. In criminal cases, however, not only are the instances of the use of a demurrer much less numerous, but there is considerable dispute as to the propriety of this form of procedure at all. West Virginia has recently ranged itself with those jurisdictions which deny the propriety of the demurrer to evidence in criminal cases, although it is allowed there in civil suits. *State* v. *Alderton*, 40 S. E. Rep. 350.

It is objected that if the accused has the right to demur to the evidence the state would have the same right without the consent of the accused, and thus the constitutional safeguard of trial by jury would be taken away. A short answer to this objection would seem to be that in criminal prosecutions a joinder in demurrer is optional, not compulsory as it is in civil suits. See *Baker's Case*, Cro. Eliz. 752 ; *Duncan* v. *State*, 29 Fla. 439. The second argument urged against the propriety of the demurrer is that it deprives the accused of the right to be proved guilty beyond every reasonable doubt, because, it is said, "all doubt must be resolved against the demurrant." The objection seems to rest upon the erroneous assumption that inferences from the evidence must be taken as strongly against the demurrant in criminal as in civil suits. The effect of a demurrer to evidence, it is submitted, is that the defendant contends that upon the evidence presented, the court acting as a jury would not be justified in finding an adverse verdict. See *Trout* v. *Virginia, etc., R. R. Co.*, 23 Gratt. (Va.) 619, 639. The court, therefore, no more than a jury, ought to deprive the accused of reasonable doubts in his favor. But even if it be granted that the accused does by his demurrer lose the benefit of having doubtful inferences taken in his favor, why should he not be allowed to waive this right? This view is held in *Martin* v. *State*, 62 Ala. 240.

On principle, therefore, there seems to be no valid objection to demurrers to evidence in criminal prosecutions provided jury trial may